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EXHIBIT #1

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973

WEDNESDAY, OCTOBER 3, 1973

CASE NO. 42,937

DAVID SPICY,

Petitioner,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

[Filed October 5, 1973]

On consideration of the petition for rehearing filed by attorney for respondent, reply thereto and response to reply,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ROBERTS, ERVIN, ADKINS, McCAIN and DEKLE, JJ., concur

CARLTON, C.J., and BOYD, J., dissent

Y
CC: Hon. Alan H. Rothstein
(Hon. John S. Lloyd,
Hon. Montague Rosenberg
Hon. R. Harris Turner)
Theodore M. Trushin Law Offices
(Hon. Michael B. Solomon)
Hon. W. P. Carter, Clerk

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Kay D. Yent
Deputy Clerk

EXHIBIT #2

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

[TITLE OMITTED]

Opinion filed June 27, 1973

Writ of Certiorari to the District Court of Appeal, Third District

Michael B. Solomon of Theodore M. Trushin Law Offices, for Petitioner

Alan H. Rothstein, City Attorney and R. Harris Turner, Assistant City Attorney, for Respondent.

ON REHEARING GRANTED

DEKLE, J.

Conflict as a basis for review on certiorari became apparent upon a close consideration of the factual situation appearing on the face of the Third District Court's opinion at 266 So.2d 101 (1972), reversing a resolution of those facts by a jury. Our quashal of a similar substitution of factual judgment by the Third District in Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972), and the holding in Golden Hills Turf and Country Club v. Buchanan, 273 So.2d 375 (Fla. 1973), are bases for conflict, affording jurisdiction under Fla. Const. art. V, § 3(b)(3)(1973).

Two City of Miami police officers during the course of their duties saw Alton Exson (petitioner's decedent) in the right front passenger side of a taxicab in a dazed, incoherent condition suffering from a head injury. There was blood on the back of his head, on the seat of the cab and the sidewalk. The police testified that at the scene (taxi) the deceased spoke "in a slow manner", did not answer coherently and his eyes were "glassy looking". "That's why I started asking his co-worker what's wrong with him." The officers did not detect any alcohol on his breath.

Decedent was transported to Jackson Memorial Hospital for an examination. The examining intern at the hospital stated that when he asked about drinking, Exson told him that he had earlier had "two drinks." The doctor "felt that he had been drinking to the extent that he had a staggering gait," although he conceded that neurological impairment to his legs from a blow on the head could also cause his staggering. The doctor had "no opinion as to whether or not he was drunk". "I can't say that he was." He recalls no conversation relaying his views to the police. Yet, the police based the required "substantial reason to believe the plaintiff was committing a misdemeanor"[1] (public drunkenness) upon the intern's later determination as to whether he was in fact drunk. This the officers cannot do. It is the officer's judgment that must be exercised. It is he who must support by his testimony the charge he makes. Here he admits that he cannot when he testifies:

"Q. You wrote up an arrest paper, you said?
A. Right, and an injury report.

[1]City of Miami v. Albro, 120 So.2d 23, 25 (Fla.App.3d 1960).

Q. What was the reason you wrote up both?
A. Well, the reason I wrote up both, because I was not able to determine his problem. I felt like he was injured, I felt like he possibly could have been drunk; I didn't know which one.

Q. You did not know which one at the time—
A. Actually.

* * *

"Q. Would it be a fair statement to say that after you waved goodbye to Mr. Exson leaving in the ambulance you left it entirely up to whatever doctor examined or was supposed to examine Mr. Exson regarding whether or not he was drunk?
A. Right.

* * *

"Q. Besides that, did he appear to be normal?
A. Drunk or injured.

Q. Drunk or injured?
A. Drunk or injured. His condition could have been from an injury or his condition could have been from some type of alcohol."

(Emphasis added)

The judge also questioned Officer Bowles concerning the substance of his testimony:

"THE COURT: He said he [officer] could not determine whether he was drunk or injured, so he said he left it up to the doctor.

> You tell me [doctor] if, from your examination this man is injured. If he is injured, release him. If he is drunk, you have my arrest slip. Put him in the jail.
>
> THE WITNESS [Bowles]: Yes.
>
> THE COURT: Am I telling it exactly as it was?
>
> THE WITNESS: Yes, sir, exactly like it was. That's the information that I sent to the hospital."

After the examination was completed at the hospital Exson was released to the Police Department and taken to jail. It never is clear as to his arrest.[2] The following day, his condition worsened, and he was returned to the hospital. A few days later, Exson died from multiple fractures of the skull and multiple contusions and lacerations.

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[2] "Q What happened next?
"A So I requested the ambulance and I made two reports. I made the type of report that he would be admitted to the hospital and I made the type of report that he would be sent to the city jail if he was drunk. I gave the ambulance driver the two reports to give to the booking officer at the hospital. If this man was found, through the doctor, to be injured, then the arrest report could be torn up. If, through the doctor, he was found to be drunk, then he could be sent to the station.
"Q Then you, personally, did not take Mr. Exson to the hospital?
"A I sent him by ambulance.

* * *

"Q. Therefore, after you sent Mr. Exson in the ambulance you never saw him again; is that correct?
"A. I never saw him again.

* * *

"Q. Did you consider him under arrest at that moment?
"Q. Not necessarily, because I had to wait for the report on the doctor." (Emphasis added)

Exson's administrator, petitioner herein, sued the City of Miami, respondent herein, and others, under the survival statute,[3] for false imprisonment. The complaint alleged that the City by and through its police officers falsely imprisoned Exson and were thereby liable under the doctrine of respondeat superior.[4] Following a trial on the issues, the jury said the City falsely imprisoned Exson and awarded $5,000 damages.

The Third District's opinion

reversed the jury's verdict on the ground that "under the circumstances reasonable men could not differ that the police officer acted reasonably." In making this decision, the DCA cited City of Miami v. Albro, 120 S.2d 23 (Fla.App.3d 1960), as controlling precedent. In Albro, the district court said if the police officer has substantial reason to believe that the person was committing a misdemeanor, the officer can arrest him. Right. BUT — as we have pointed out herein — the officer and not an intern at a later time, must have the "substantial reason" and must "believe" from observation and evidence at the point of arrest that the person was then and there committing a misdemeanor in his presence.[5] The officer cannot base his arrest upon hearsay or a subsequent determination by a third person at a different point in time.

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[3]Fla. Stat. § 46.021.

[4]Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

[5]Fla. Stat. 901.15. Cf. State v. Perez, ___ So.2d ___ (Fla. 1973) (Opinion filed May 16, 1973).

The district court also said that "the courts cannot second guess the officer in the performance of his duty." The Third District is correct that those of us sitting on the Court cannot do so but this is not to say that a jury cannot, for indeed it is the jury which makes the factual determination of whether the officer was correct or not, where there are conflicting facts such as these, from which reasonable men could at least differ — from which in fact they would be hard put to find other than as they did in these circumstances. Indeed, the trial judge would have been well within his authority if he had directed a verdict for the plaintiff where it was so clear, and the officer admitted, that he did not know and could not determine at the scene whether the deceased was drunk or just injured; ergo, no "substantial reason". The unfortunate "drunk" might better have fallen into the hands of the Good Samaritan.[6]

The question is not one of whether or not the police acted reasonably in taking the deceased to a hospital when it was so apparent that he was injured. Of course they should have done so with all haste. It is rather a question of whether they had good cause at the time they found the deceased to place him under arrest and to imprison him. The subsequent visit to the hospital was merely an interlude over which the deceased had no control in view of his arrest and head injury, and in view of his being promptly dispatched to jail after the hospital examination and placed in a "drunk tank" there until it was necessary to return him to the hospital where he died

[6]St. Luke 10:33-34.

a few days later from massive hemorraging from multiple fractures of the skull.

The key time to be considered with respect to an arrest is that moment of arrest at the scene, as to whether there was then and there (not as thereafter may have been concluded) reasonable cause for arrest.[7] The fact was that there was no substantial reason at the scene really to know what was wrong with the unfortunate man at that point. The police officer testified three different times that he did not know at that juncture what was wrong with the man. The only subsequent event that could be related was a statement by the deceased upon inquiry by the doctor at the hospital, that he had two drinks earlier. This alone would not be a "substantial reason to believe that the person was committing a misdemeanor."

Police officers during their duties encounter persons in various conditions of sobriety and health so that they are charged with a degree of judgment of the ordinary police officer in such a situation in determining whether there is substantial reason to believe that the person involved is in the process of committing a misdemeanor, namely being drunk, and the officers here have said that they detected no odor of alcohol at the scene. It takes little imagination to understand the jury's conclusion that the officers did not act with substantial reason and to find in favor of the deceased's administrator.

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[7]See State v. Perez, So.2d (Fla. 1973) (Opinion filed May 16, 1973), quoting from Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

Petition for certiorari is granted, the district court's decision at 266 So.2d 101 (1972) is hereby quashed with instructions to remand the cause for reinstatement of the jury's verdict for the petitioner.

It is so ordered.

ROBERTS, ERVIN, ADKINS and McCAIN, JJ., Concur

CARLTON, C.J. and BOYD, J., Dissent

EXHIBIT #3

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1972

CASE NO. 71-1276

CITY OF MIAMI, a municipal corporation,

Appellant,

vs.

DAVID SPICY,

Appellee.

Opinion filed August 8, 1972.

An Appeal from the Circuit Court for Dade County, Milton A. Friedman, Judge.

Alan H. Rothstein, City Attorney, and Sidney B. Shapiro and R. Harris Turner, Assistant City Attorneys, for appellant.

Theodore M. Trushin and Michael B. Solomon, for appellee.

Before CHARLES CARROLL, HENDRY and HAVERFIELD, JJ.

HENDRY, Judge.

Appellee-defendant, the City of Miami, seeks review of a $5,000.00 judgment, entered pursuant to a jury verdict in that amount, in favor of appellee David Spicy, successor administrator of the estate of Alton Jimmie Exson, in an action for false imprisonment brought under the survival statute.

The first administrator filed suit against Dade County, the City of Miami, and a physician working at Jackson Memorial Hospital, which is operated by the County. The county and the physician entered into a settlement with the plaintiff, leaving the city as the only defendant. The city's motion for summary judgment was granted in part so that the issues became joined solely as to the allegations that the decedent was falsely imprisoned by a police officer, for which the city would be liable under the doctrine of respondent superior.

We express the view that City of Miami v. Albro, Fla.App.1960, 120 So.2d 23 is controlling, and that the evidence presented was insufficient to sustain the verdict of liability against the city.

On July 1, 1962, police officers found Alton Jimmie Exson in a dazed condition suffering from a head injury. The arresting officer testified that Exson acted drunk rather than injured, even though blood was on the seat of the taxicab and the sidewalk and the officer saw a cut at the back of Exson's head. The officer did not

detect any alcohol on his breath. The officer also explained that none of Exson's co-workers would take him home. Therefore, Exson was taken into custody and transported by ambulance to Jackson Memorial Hospital for an examination. The officer filled out both an examination report and an arrest report for drunkenness.

The physician at the hospital conducted an examination which revealed a small laceration in the back of his head and a negative neurological indication. While being examined, Exson admitted to the physician that he had been drinking.

After the examination was completed, Exson was released to the police department and was taken to jail. The next day, his condition worsened, and he was returned to Jackson Memorial Hospital. He died on July 19, 1962. The autopsy report showed that deceased suffered multiple fractures of the skull and multiple contusions and lacerations.

In the Albro case, supra, at p. 26, the court stated:

> "In considering the legality of an arrest by a municipal officer for a breach of the peace committed in his presence, the determining factor is not whether the charged person is actually guilty. The question to be determined is whether or not the officer had substantial reason to believe the plaintiff was committing a misdemeanor. If substantial reason exists the courts cannot second guess the officer in the performance of his duty. In the instant case the cause was not submitted to the jury upon the issue of

whether the officer used excessive force but on the issue of whether the plaintiff committed an offense."

The officer observed Exson in a dazed, incoherent condition with glassy eyes, and suffering from a cut. The officer described him as being drunk, even though he smelled no alcohol on Exson's breath, and placed him under arrest. The officer sent Exson to the hospital for examination, which examination disclosed no severe injuries and during which time Exson admitted drinking. Drunkenness, for which Exson was placed under arrest, was a misdemeanor under § 856.01, Fla.Stat. 1959 (which was identical to the present statute before its repeal by 1971 Laws of Florida, Ch. 71-132, § 17, to be effective July 1, 1973) and the predecessor municipal ordinance sections of the City of Miami Code §§ 38—13 and 38—50. Under the circumstances reasonable men could not differ that the police officer acted reasonably. Thus, the lower court erred in failing to direct a verdict for the defendant.

Therefore, the judgment appealed is reversed and remanded with directions to enter a verdict for the defendant city.

EXHIBIT #4

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 42,937

DAVID SPICY,

Petitioner,

vs.

CITY OF MIAMI, a municipal corporation,

Respondent.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF FLORIDA:

Respondent, CITY OF MIAMI, a municipal corporation, by and through its undersigned counsel, files this its Petition for Rehearing respectfully requesting this Honorable Court to reconsider its decision and opinion filed on June 27, 1973 on rehearing granted, wherein this Court quashed the decision of the District Court of Appeal, Third District, at 266 So.2d 101 (1972) with instructions to remand the cause for reinstatement of the jury's verdict for the plaintiff.

As grounds for rehearing, respondent, CITY OF MIAMI, respectfully suggests the following:

I. The Court, in arriving at its decision, overlooked or failed to consider the following:

(a) The Supreme Court having granted certiorari considers the merits of the entire cause. This court has overlooked or failed to consider the merits of the entire cause in confining its opinion to the sole issue of false imprisonment. The subsequent paragraphs outline merits which have been overlooked or not considered.

(b) The trial court erred in holding that the administrator was a proper party to bring an action for wrongful death because the evidence at the trial demonstrated there was a widow to bring such action. In overlooking the aforesaid facet of the case, this Court has overlooked its own decision and opinion in the case of Love v. Hannah (Fla. 1954), 72 So.2d 39. In construing the wrongful death statute, Section 768.02, Florida Statutes, this Court held that the existence or non-existence of anyone having the precedent right of action under the statute enters into the very substance of the right of action itself when instituted by any of the named classes of persons after the first.

(c) The trial court erroneously refused to limit the area of damages to the damages sustained by the deceased in jail and erroneously allowed into evidence the fact of the death of the deceased which occurred in Jackson Memorial Hospital. In overlooking or failing to consider this point, this court overlooked the fact that damages awarded plaintiff were NOT proved to have been sustained from the direct result of the stay in jail of the deceased. See Cone v. Intercounty Telephone and Telegraph Company (Fla. 1949), 40 So.2d 148, as follows:

> "Conversely, when the loss is not a direct result of the negligent act complained of, or does not follow a natural ordinary sequence of such an act but is merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not be allowed."

(d) The trial court erred in not entering the judgment with set off as requested by defendant. In overlooking this point, this Court has failed to consider the requirements of Section 768.041(2), Florida Statutes, as follows:

> "At the trial if any defendant shows the court that the plaintiff or other person lawfully on his behalf has delivered a release or covenant not to sue to any person, firm or corporation in partial satisfaction of the damages sued for the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering the judgment and enter judgment accordingly."

The amount paid by the doctor and the hospital in settlement should have been allowed to have been applied against the $5,000 judgment entered against the CITY OF MIAMI, as a set off.

(e) There was no evidence to indicate that the imprisonment of the deceased was the proximate cause of his death. The deceased was transferred from Jackson Memorial Hospital by Dr. Whaley without medical treatment. No evidence was adduced to show that the deceased at the time needed medical treatment, or would have or

could have sought such medical treatment if he had not been transferred to jail by Dr. Whaley.

(f) All of the above points were raised in the District Court of Appeal by the CITY OF MIAMI. It was not necessary for that court to consider them because that court held that the arrest of the deceased was proper.

This court, however, in holding that the arrest was unlawful, should then have proceeded to consider these other points which constitute the merits of the case which this court should consider having granted certiorari.

In summary, this Court has overlooked or failed to consider the following points:

(1) The administrator was not the proper party to bring an action for wrongful death because his own testimony indicated the existence of a common-law wife at a time when common-law marriage was lawful in Florida.

(2) The trial court erroneously refused to limit the area of damages only to those the deceased may have suffered during his stay in jail, because there was no evidence shown by either expert or other medical testimony that the death of the deceased resulted from any action the CITY OF MIAMI did or did not take.

(3) The Trial Court erroneously refused to enter a judgment with set off as requested by defendant, CITY OF MIAMI, because the sum received by the plaintiff from other defendants should have been applied in reduction of the judgment rendered against the CITY OF MIAMI by virtue of Section 768.041, Florida Statutes.

See also Thomas Air Conditioning & Refrigeration Co. v. Bankston (Fla. App. 1970) 231 So.2d 272.

II. In addition, this Court has violated the right of the CITY OF MIAMI to due process of law under the 14th Amendment to the U. S. Constitution by overlooking the fact that, by its decision, the Court has made the CITY OF MIAMI responsible for the negligence or fault of a third party.

False imprisonment, if any occurred, was committed by the previous defendant, Dr. Preston Whaley. It was Dr. Whaley who transferred the deceased from the Jackson Memorial Hospital to the Miami City Jail. If Dr. Whaley found that the deceased was neither drunk nor injured he should have simply released the deceased.

This court's own quotation of the evidence clearly shows that if there were false imprisonment the false imprisonment was the act of the previous defendant, Dr. Whaley, and not the arresting officer.

In Footnote 2 of this Court's opinion, the following testimony of the police officer is quoted:

> "A. . . . . If this man was found, through the doctor, to be injured, then the arrest report could be torn up. If, through the doctor, he was found to be drunk, then he could be sent to the station. . . . . I sent him by ambulance (to the hospital)."

In fact, all the police officer did was to send the deceased to the hospital by ambulance. The instruction

of the police officer was to send the deceased to the station if he was found to be drunk. Obviously, if he was not found to be drunk he should have either been kept in the hospital or released.

Thus, the Court, in overlooking the fact that the false arrest, if any, was committed by Dr. Preston Whaley and not by the officer employed by the CITY OF MIAMI, the Court has denied the CITY OF MIAMI due process of law under the 14th Amendment to the U. S. Constitution by making the CITY OF MIAMI responsible for the fault of another not employed or connected with the CITY OF MIAMI in any fashion.

III. This Court has further failed to consider that its decision and opinion has denied to individual police officers in Florida, as well as the CITY OF MIAMI, equal protection of the laws and due process of law guaranteed by the U. S. Constitution because the opinion makes police officers responsible for a standard of care which is impossible to perform by requiring the following of police officers:

(1) Each police officer making an arrest to be a judge of possible latent medical problems;

(2) Police officers are the guarantors of the life, health and medical safety of arrested persons who may later have medical problems.

WHEREFORE, respondent, CITY OF MIAMI, prays that a rehearing be granted so that this court may consider the merits of this cause, and the constitutionality of its opinion as it stands.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to THEODORE M. TRUSHIN LAW OFFICES, Attorney for Petitioner, 420 Lincoln Road, Miami Beach, Florida, this 10th day of July, 1973.

ALAN H. ROTHSTEIN,
City Attorney
JOHN S. LLOYD,
Asst. City Atty.
MONTAGUE ROSENBERG,
Asst. City Atty.
65 S. W. 1st Street, Miami, Florida

/s/ Montague Rosenberg
By _____
Montague Rosenberg
Attorney for Respondent